NOTICE OF REQUEST
FOR COMMENTS REGARDING
PROPOSED AMENDMENTS
TO THE MISSISSIPPI RULES OF EVIDENCE

Pursuant to Rule 27(f) of the Mississippi Rules of Appellate Procedure, the Supreme Court now seeks comments from the bench, the bar, and the public on the proposed amendments.

Comments should be filed with the Clerk of the Supreme Court, Gartin Justice Building, P.O. Box 249, Jackson, Mississippi 39205-0249, no later than **Tuesday, March 10, 2009.**

The Advisory Committee on Rules has filed a Motion to Amend Certain Rules of the Mississippi Rules of Evidence.

Proposed Amendments to the Mississippi Rules of Evidence

{Note: New language is underlined; language to be deleted is ~~stricken through~~.}

Rule 103. Rulings on Evidence

Reporter's Note: The following changes essentially embrace parallel

amendments to federal Rule 103(a). Further amendments adopt the rule announced in *Luce v. U.S.* and, with some qualifications, reject the rule announced in *Ohler v. U.S.*

With regard to rulings in limine, the proposed changes are unlikely to affect current Mississippi practice. *See Jones v. Panola County,* 725 So.2d 774, 775 (Miss. 1998) ("filing of a motion in limine regarding the introduction of evidence properly preserved the issue for appeal and that a contemporaneous objection was not necessary"); *Lacy v. State,* 700 so.2d 602 (Miss. 1997).

Under *Luce v. United States,* 469 U.S. 38 (1984), a federal defendant must testify at trial in order to preserve a claim of error predicated on a trial court's decision to admit the defendant's prior convictions for impeachment. At present, anyway, a Mississippi defendant need not. In *Williams v. State,* 684 So.2d 1179 (Miss. 1996), the court noted it had "not yet decided whether we will follow the federal course. ... At the very least, a defendant wishing to present the point on appeal, absent having taken the witness stand himself, must preserve for the record substantial and detailed evidence of the testimony he would have given so that we may gauge its importance to his defense." (citations omitted).

Similarly, in *Ohler v. a United States,* 529 U.S. 753 (2000), the United States Supreme Court held that where the trial judge rules that the government may use a prior conviction to impeach a defendant, a defendant waives the right to appeal the issue by introducing the conviction on direct examination. Current Mississippi law is to the contrary. Under *McGee v. State,* 569 So.2d 1191 (Miss. 1990), a pre-*Ohler* case, a defendant may preempt the state by offering evidence of the defendant's own prior conviction on direct examination without waiving the issue for appeal. The Court of Appeals has recognized the continuing validity of *McGee* after *Ohler. See Malone v. State,* 829 So.2d 1153 (Miss. Ct. App. 2002).

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent

from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(3) Effects of Definitive Rulings. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. Moreover, a party who objects to evidence of a prior conviction the court finds admissible in a definitive ruling does not waive or forfeit a claim of error by offering the evidence. But if under the court's ruling there is a condition precedent to admission or exclusion, such as the introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be predicated upon the ruling unless the condition precedent is satisfied.

Continuing objections to evidence of the same or a similar nature or subject to the same or similar objections may in the discretion of the trial judge be allowed.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Comment

Rule 103 concerns the making of an evidentiary record for purposes of appeal.

(a) Subsection (a) reflects existing Mississippi practice. (1) The objection must state the specific ground of objection unless the specific ground is apparent from the context. This adopts and carries forward the approach taken in *Murphy v. State*, 453 So.2d 1290, 1293-1294 (Miss. 1984). (2) By the same token, when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded. *See Brown v. State*, 338 So.2d 1008 (Miss. 1976); *King v. State*, 374 So.2d 808 (Miss.1979). Federal Rule of Evidence 103, which is identical, has been interpreted to have no effect on the harmless error principle.

Subsection (a) also retains the existing practice of recognizing continuing objections, where allowed by the trial judge, as a viable means of preserving a point for appeal. *See Hughes v. State*, 470 So.2d 1046, 1048 n. 1 (Miss. 1985).

Harris v. Buxton T.V., Inc., 460 So.2d 828 (Miss. 1984) held that no offer of proof was necessary where a party was improperly prohibited from cross-examining a witness. Rule 103 (a)(2) does not affect this holding.

Section (a)(3) has three distinct, but related, effects. First, it provides that a claim of error with respect to a definitive evidentiary ruling (whether at or before trial, including rulings *in limine*) is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* M.R.C.P. 46 (formal exceptions unnecessary); *Jones v. Panola County*, 725 So.2d 774, 775 (Miss. 1998) (a ruling on "a motion *in limine* regarding the introduction of evidence properly preserved the issue for appeal and that a contemporaneous objection was not necessary"); *see also Lacy v. State*, 700 so.2d 602 (Miss. 1997). On the other hand, when the trial court has reserved its ruling or has indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. Section (a)(3) thus imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. Even when the court's ruling is definitive, nothing in this section prohibits the court from revisiting its

decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. Section (a)(3) does not apply to rulings other than those admitting or excluding evidence, such as rulings regarding, for example, the conduct of opening statements or closing arguments.

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

Secondly, Section (a)(3) also provides that a party who objects to evidence of a prior conviction (under Rules 404 or 609, for example) that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, does not thereby waive the right to appeal the trial court's ruling. This is consistent with prior Mississippi law, *see McGee v. State*, 569 So.2d 1191 (Miss. 1990) (a defendant may preempt the state by offering evidence of the defendant's own prior conviction on direct examination without waiving the issue for appeal), *Malone v. State*, 829 So.2d 1153 (Miss. Ct. App. 2002), but contrary to federal law, *Ohler v. United States*, 529 U.S. 753 (2000) (when a trial judge rules that the government may use a prior conviction to impeach a defendant, a defendant waives the right to appeal the issue by introducing

the conviction on direct examination). Importantly, Section (a)(3) does nothing to vitiate the authority of the trial judge to control the timing of the preemptive admission of evidence of a prior conviction when there is serious doubt about whether the opposing party will, in fact, offer the evidence. For example, the trial judge can impose a condition precedent to preemptive admission, such as by requiring the prosecution first to confirm, at or near the time of the defendant's testimony, its intent actually to offer evidence of a prior conviction. *See* Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual, vol. 1, sec. 103.02[14] (2006). Notably, Section (a)(3) states only that a party who objects to evidence of *a prior conviction* that the court finds admissible in a definitive ruling does not waive the right to appeal the ruling by offering the evidence to remove the sting of its anticipated prejudicial effect. The Rule does not address whether or not a party's offer of other objectionable evidence that the court finds admissible in a definitive ruling operates as a waiver of the right to appeal the ruling. Section (a)(3) leaves the development of the law of waiver in such other situations unaffected.

Third, Section (a)(3) also embraces the principles of *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. In *Luce*, the Supreme Court held that a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. Section (a)(3) extends the *Luce* principle to all situations in which the occurrence of a trial event is a condition precedent to the admission or exclusion of evidence. Lower federal courts have applied *Luce* to a wide array of contexts. *See United States v. DiMatteo*, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994), ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the in limine ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir.1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules in

limine that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal). This represents a change in Mississippi practice. In *Williams v. State*, 684 So.2d 1179 (Miss. 1996), the Mississippi Supreme Court noted it had yet to follow *Luce*. Rather, "a defendant wishing to present the point on appeal, absent having taken the witness stand himself, must preserve for the record substantial and detailed evidence of the testimony he would have given so that we may gauge its importance to his defense." (citations omitted).

(b) Rule 103 (b) is consistent with pre-rule Mississippi case law which provided that a trial judge was entitled to explain his rulings. *Ratliff v. State*, 313 So.2d 386 (Miss. 1975); *Ladnier v. State*, 273 So.2d 169 (Miss. 1973).

The court may also permit the aggrieved party to preserve the record by dictating into the record a statement of the evidence offered but excluded. This accords with the rule announced in such cases as *Murray v. Payne*, 437 So.2d 47, 55 (Miss. 1983).

(c) Subsection (c) is an attempt to protect the jury from exposure to inadmissible evidence. It conforms to Mississippi practice. *See Cutchens v. State*, 310 So.2d 273 (Miss. 1975).

(d) Subsection (d), regarding plain error, is a restatement of that doctrine as it existed in pre-rule practice. It reflects a policy to administer the law fairly and justly. A party is protected by the plain error rule when (1) he has failed to perfect his appeal and (2) when a substantial right is affected. ~~Miss.Sup.Ct.R.~~ MRAP 6(b) and 11 permit a plain error rule: "The Court may, at its own option, notice a plain error not assigned or distinctly specified." *See also Boyd v. State*, 204 So.2d 165 (Miss. 1967). If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. *See Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975). The plain error rule may be applied in either criminal cases or civil cases. *See House v. State*, 445 So.2d 815 (Miss. 1984).

Rule 606. Competency of Juror as Witness

Reporter's Note: The proposed amendments to the rule are technical only, and are designed to render the text of the rule gender neutral. Currently, MRE 606 has no comment; hence the proposed comment is entirely new.

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which ~~he~~ the juror is sitting ~~as a juror~~. If ~~he~~ the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that ~~his~~ or any other juror's mind or emotions as influencing ~~him to~~ assent to or dissent from the verdict or indictment or concerning the juror's ~~his~~ mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may ~~his~~ a juror's affidavit or evidence of any statement by the juror ~~him~~ concerning a matter about which the juror ~~he~~ would be precluded from testifying be received for these purposes.

Comment

Rule 606(a) disqualifies a juror from taking the witness stand during the trial of the case in which the juror is sitting. Of course, calling a juror as a witness will be rare; voir dire will generally expose a juror's knowledge of facts relevant to a case and result in disqualification of the juror for cause.

Rule 606(b) is designed to protect all "components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process." *See* FRE

606, Advisory Committee Notes. Thus testimony or affidavits of jurors is incompetent to show a compromise verdict, a quotient verdict, misinterpretation of instructions, and the like. See, e.g., *Hayes v. Entergy Mississippi, Inc.*, 871 So.2d 743 (Miss. 2004) (pressure to reach a verdict); *Busick v. St. John*, 856 So.2d 304 (Miss. 2003) (misinterpretation of instructions); ***APAC-Mississippi, Inc. v. Goodman***, 803 So.2d 1177 (Miss. 2002) (quotient verdict); *Curtis v. Bellwood Farms, Inc.*, 805 So.2d 541 (Miss. Ct. App. 2000) (improper consideration of attorney's statements despite court's cautionary instruction); *Gavin v. State*, 767 So.2d 1072 (Miss. Ct. App. 2000) (confusion regarding instructions); *Galloway v. State*, 735 So. 2d 1117 (Miss. Ct. App. 1999) (improper consideration of defendant's prior conviction). A juror's knowledge, as to the precluded matters, is equally inadmissible whether in the form of the juror's own testimony, an affidavit, or evidence of the juror's statements. This broad rule of exclusion ensures jurors "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." *See* FRE 606, Advisory Committee Notes.

Rule 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity. Even when grounds are alleged to exist, there is a "general reluctance after verdict to haul in and probe jurors for potential instances of bias, misconduct or extraneous influences." *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So.2d 407, 418 (Miss. 1993) (discussing substantive grounds for setting aside a verdict). At the least, a party needs to show "a specific, non-speculative impropriety has occurred," and the trial court must supervise any post-trial investigation to "ensure that jurors are protected from harassment and to guard against inquiry into subjects beyond which a juror is competent to testify." *Id.* at 419. When jurors are permitted to testify about objective facts not of record and about outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. *Id.*

In narrowly prescribed circumstances, Mississippi permits the correction of clerical errors in the verdict, notwithstanding Rule 606(b). *See Martin v. State*, 732 So.2d 847, 851-855 (Miss. 1998) (Verdict incorrectly stated the defendant was guilty of possession of morphine when in fact the jury unanimously found the defendant not guilty. Such an allegation of clerical error did "not challenge the "validity" of the verdict or the deliberation or mental process of the jurors.") Of course, the possibility of clerical errors in the verdict form will be reduced substantially by polling the jury. Errors that come to light after polling the jury "may be corrected on the

spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

Rule 608. Evidence of Character and Conduct of Witness

Reporter's Note: The proposed amendments to the rule track corresponding federal changes by substituting the more precise term "character for truthfulness" for the broader and vaguer term "credibility." Other changes render the text of the rule gender neutral.

In addition, the comment was revised substantially in two ways. One was the deletion of language designed to assist transition to practice under the rules, which is no longer necessary. The other was the inclusion of expanded commentary on the prohibition against impeaching a witness's character for truthfulness with extrinsic proof of a witness's conduct, as this complex body of law warranted fuller explanation.

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's ~~his credibility~~ character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1)

concerning the witness's ~~his~~ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the ~~his~~ privilege against self-incrimination when examined with respect to matters which relate only to ~~credibility~~ character for truthfulness.

Comment

Rule 608 is concerned with character evidence of witnesses. Rule 404(a) prohibits the use of character evidence to prove conformity of conduct, but with some exceptions. Rule 608 addresses those exceptions. Thus, it is necessary to read both rules together.

Subsection (a) permits the introduction of character evidence of a witness only after the witness's ~~his~~ character for veracity has been attacked. A party may not bolster the ~~his witness's~~ character of the party's own witness; the party can only react in response to a charge of untruthfulness. ~~This conforms to existing practice in Mississippi. *See Austin v. Montgomery*, 336 So.2d 745 (Miss. 1976). A second limitation in subsection (a) is that~~ Moreover, only the witness's character for truthfulness or its opposite can be attacked. Other character traits are irrelevant for impeachment purposes. ~~Subsection (a) provides that the e~~Evidence shall be produced in the form of an opinion or reputation. ~~In Mississippi it has been customary to impeach using reputation evidence. *See Pickens v. State*, 61 Miss. 663 (1884). Only when a foundation was laid showing that the impeaching witness knew the reputation of the other witness was he allowed to give an opinion. Subsection (a) simplifies the admission of opinion evidence. The reason for this is that today it is generally recognized that reputation evidence is nothing more than opinion evidence and that it holds no greater likelihood of certainty than does opinion. *See* McCormick, *Evidence*, § 44.~~

Subsection (b) flatly prohibits impeaching ~~the impeachment of~~ a witness's character for truthfulness via *extrinsic proof* of ~~by~~ specific acts of the witness's conduct, ~~but it provides two important exceptions. First, a witness may be impeached by a~~ except criminal convictions pursuant to ~~.~~ Rule 609~~. governs the kinds of criminal convictions which may be used to~~

~~attack a witness. Mississippi has traditionally allowed a witness to be impeached by evidence of a criminal conviction but not by other specific acts. *See Vick v. Cochran*, 316 So.2d 242 (Miss. 1976); *Allison v. State*, 274 So.2d 678. Details of the crime may not be elicited.~~ In contrast, specific instances of conduct of the witness may, in the discretion of the court, be inquired into on *cross-examination* of that witness (or on cross-examination of another who testifies concerning that witness's character for truthfulness) *if* probative of truthfulness or untruthfulness. *See Brent v. State,* 632 So.2d 936, 944 (Miss. 1994) ("If the past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination.")

This absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness's character for truthfulness. The admissibility of extrinsic evidence offered for other grounds of impeachment, such as contradiction, prior inconsistent statement, bias, and mental or sensory capacity, is governed by Rules 402, 403, and 616.

The extrinsic evidence prohibition of Rule 608(b) bars the use of any kind of evidence, including documents or the testimony of other witnesses, except a direct admission by the witness being cross-examined. *See Brent* at 945 ("a party cross-examining a witness about past instances of conduct is bound by the witness's answer [and] is not permitted to offer evidence in rebuttal to contradict it.") The extrinsic evidence prohibition likewise bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)").

~~The second exception of Rule 608 goes further than pre-rule Mississippi practice. This exception allows for impeachment by specific acts which are something other than criminal convictions when the character trait of truthfulness of the witness being cross-examined is under attack. The second exception also allows the witness to be cross-examined regarding~~

~~specific acts involving the truthfulness of another witness about whom he has testified. This exception only applies when the character trait of truthfulness or untruthfulness is being explored.~~

Of course, counsel must have a good faith basis before beginning to inquire on cross-examination about specific instances of past conduct, and may not merely seek a "fishing license." *Brent,* 632 So.2d at 645.

The last sentence of Rule 608 seeks to guarantee that a witness does not waive the ~~his~~ privilege against self-incrimination when ~~he is~~ questioned about matters relating to ~~his~~ credibility.

Rule 609. Impeachment by Evidence of Conviction of a Crime

Reporter's Note: As with similar changes to MRE 608, the proposed amendments to MRE 609 rule track corresponding federal changes by substituting the more precise term "character for truthfulness" for the broader and vaguer term "credibility." In addition, proposed amendments to the Comment embrace an approach to defining *crimen falsi* that is also similar to federal practice.

(a) General Rule. For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, Expungement or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Comment

Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(1) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(1) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State*, 785 So.2d 1059 (Miss.2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony drug conviction. In *Moore v. State*, 787 So.2d 1282 (Miss.2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State*, 518 So.2d 632 (Miss.1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is persuaded by the opponent that the probative value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. See *Moore*, above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or

falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

Rule 609(a)(2) requires that the proponent have ready proof that the crime was in the nature of *crimen falsi.* Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment -- as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly -- a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States*, 110 S.Ct. 2143 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States,* 125 S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the rule does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The reference in former 609(a) to proving a conviction during cross-examination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

The first sentence of 609(a) uses the term "character for truthfulness" instead of the prior term "credibility," because the limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Subsection (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subsection (b) is based on fairness. A person's past should not be able to haunt the person ~~him~~ for ~~the duration of his~~ life. The judge may grant an exception in instances where the probativeness of the conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subsection (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subsection (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subsection (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See* FRE 609, Advisory Committee's Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness, other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subsection (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction

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Mississippi Rule of Evidence 617. Use of Closed Circuit Television to Show Child's Testimony.

Reporter's Note: The decisions in *Crawford v. Washington,* 124 S.Ct. 1354 (2004), and *Davis v. Washington,* 126 S.Ct. 2266 (2006), cast serious doubt on the Constitutional underpinnings of MRE 617. In any event, while *Maryland v. Craig* remains good law, at least for now, *Idaho v. Wright* does not. For a discussion of this issue under Federal practice, *see United States v. Sandoval,* 2006 WL 1228953 (D.N.M. 2006). The reference in the comment to *Idaho v. Wright* is therefore deleted.

The federal procedure is statutory, and there is no corresponding federal rule of evidence.

(a) Upon motion and hearing in camera, the trial court may order that the testimony of a child under the age of sixteen (16) years, that an unlawful sexual act, contact, intrusion, penetration or other sexual offense was committed upon him or her be taken outside of the courtroom and shown in the courtroom by means of closed-circuit television upon a finding that there

is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court and, in the case of a criminal prosecution, if compelled to testify in the presence of the accused.

(b) The motion may be filed by the child, his attorney, parent, legal guardian or guardian ad litem, the prosecuting attorney, or any party to the case. In addition, the court may act upon its own motion.

(c) Upon stipulation of the parties, the court may appoint a person, who is qualified as an expert in the field of child sexual abuse and who has dealt with the child in a therapeutic setting concerning the offense or act, to aid in formulating methods of questioning the child and to assist the court in interpreting the answers of the child.

(d) Closed circuit television testimony may be taken by any method not inconsistent with the Confrontation Clauses of the Constitution of the United States and of the State of Mississippi, the Mississippi Rules of Civil Procedure, the Mississippi Uniform Criminal Rules of Circuit Court Practice, and these rules. In the case of a criminal prosecution, after a determination that the defendant's presence would cause a substantial likelihood of serious traumatic emotional or mental distress to the child, the trial court may exclude the defendant from the room where the testimony is taken. In any such case in which the defendant is so excluded, arrangements must be made for the defense attorney to be in continual contact with the defendant by any appropriate private electronic or telephonic method throughout the questioning. The defendant, the court and the jury must be able to observe the demeanor of the child witness at all times during the questioning.

(e) The court shall make specific findings of fact, on the record, as to the basis for its rulings under this rule.

(f) All parties must be represented by counsel at any taking of any testimony under this rule.

(g) This rule does not preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

Comment

This rule provides an exceptional procedure for the taking of testimony from children said to have been the victims of sexual abuse. If this rule is applied in a criminal case, the rights of the defendant under the Confrontation Clauses of Federal and State Constitutions must be respected. ~~*Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990);~~ *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

Rule 407. Subsequent Remedial Measures.

Reporter's Note: The proposed amendments to the rule track two corresponding federal changes. One confirms that the rule applies only to remedial changes made after the occurrence that produced the damages giving rise to the action. The second confirms that the rule does apply in product liability cases. In addition to corresponding changes to the Comment, language designed to assist transition to practice under the rules has been deleted from the Comment.

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm ~~event~~ less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Comment

This rule prohibits evidence of subsequent repairs to be introduced for the purpose of proving negligence or liability, including products liability. However, it may be admitted into evidence for another purpose. The second sentence of the rule discusses its limitations. The rule mentions ownership, control, feasibility and impeachment as admissible purposes, but this is not an exclusive list of permitted grounds, only an illustrative list.

The primary reason for this rule is a sound one. If such evidence were admissible on the issue of culpability, then the person responsible would have less ~~little~~ incentive to correct the defect. By excluding subsequent repairs and remedies, the rule encourages the owner to render ~~his~~ the property safer, or at least does not discourage ~~him from making~~ repairs. The rule applies only to remedial changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant before the "event" causing "injury or harm" does not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. Courts applying Rule 407 ~~this principle~~ have excluded evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees.

~~Under Mississippi common law, only two exceptions were noted to this principle: evidence of subsequent repairs was admissible (1) if the defendant had testified that modifications were not feasible and (2) if the defendant claimed that the modified conditions were the same conditions that existed at the time of the accident. *See Chicago Mill & Lumber Co. v. Carter*, 209 Miss. 71, 46 So.2d 854 (1950); *Standard Oil v. Franks*, 167 Miss. 282, 149 So. 798 (1933). Rule 407 is more liberal than was the similar Mississippi practice.~~

Rule 804. Hearsay Exceptions; Declarant Unavailable

Reporter's Note: The proposed amendments to the rule track corresponding federal changes. A new subsections 804(b)(6) codifies the common law doctrine of forfeiture by wrongdoing. Other changes render the rule gender neutral. Corresponding changes are made to the Comment.

In addition, language in the Comment designed to assist transition to practice under the rules has been deleted. Moreover, a new paragraph to the Comment addresses the implications of the landmark confrontation clause decisions *Crawford v. Washington,* 124 S.Ct. 1354 (2004), and *Davis v. Washington,* 126 S.Ct. 2266 (2006).

* * * * * * * * * * *

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * * * * * * * *

(6) *Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.*

Comment

(a) In defining unavailability, the rule lists six situations in which unavailability exists:

(1) When the witness exercises a privilege, the witness ~~he~~ is deemed to be unavailable as to the portion of the witness's ~~his~~ testimony which is covered by the claimed privilege. The trial court, however, may first make a preliminary determination that the witness has the right to claim the privilege asserted.

(2) When a witness refuses to testify, despite being ordered to do so by the court, the witness ~~he~~ is deemed unavailable.

(3) If the witness testifies that the witness ~~he~~ has a lack of memory as to the subject matter under inquiry, the witness ~~he~~ is deemed to be unavailable.

(4) Death and sickness render a witness unavailable. *See Paulk v. Housing Authority of Tupelo*, 228 So.2d 871 (Miss. 1969), and

Home Ins. Co. v. Gerlach, 220 Miss. 732, 71 So.2d 787 (1954).

(5) Absence of the witness from the hearing accompanied by an inability of the proponent of the evidence to compel the witness's presence is within the definition of unavailability. Nothing in Rule 804 ~~contained herein~~, however, ~~shall~~ affects the admissibility of depositions otherwise admissible under M.R.C.P. 32 (a)(3)(B).

(6) The rationale for this definition of unavailability is based on the recognition of child trauma. ~~If the exception in Rule 804(b)(1) were to be applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).~~

A finding of unavailability and *indicia* of reliability should be made on the record.

If, however, the proponent of the evidence is responsible for the existence of any of the aforementioned conditions, the condition of unavailability for the purposes of Rule 804 is not satisfied.

~~Rule 804 gives a more expanded definition of unavailability than existed under M.C.A. § 13-1-111 (repealed effective July 1, 1991) which provided for unavailability only in the case of physical or mental incapacity.~~

(b)(1) *Former Testimony*. ~~The former testimony exception is recognized at common law. *McMasters v. State*, 83 Miss. 1, 35 So. 302 (1903).~~ An essential ingredient of the former testimony exception has always been the unavailability of the declarant. ~~*See* Ellis & Williams, *Mississippi Evidence*, § 8-19.~~

~~M.C.A. § 13-1-111 (repealed effective July 1, 1991) formerly provided for the use of former testimony in civil actions. In addition, the Mississippi court used the common law exception to admit testimony given in a prior criminal action. *Smith v. State*, 247 So.2d 705 (Miss. 1971); *Lee v. State*, 124 Miss. 398, 86 So. 856 (1921).~~

Rule 804(b)(1) permits the prior testimony to be offered (1) against the party *against* whom it was previously offered or (2) against the party who offered it previously. Thus, the rule equates the direct and redirect examination of one's own witness with the cross-examination of an adversarial witness.

It is not required that the former testimony be in an earlier proceeding of the same case. It is only essential that the party against whom it is directed had a similar motive and an opportunity to develop the testimony on the previous occasion. The rule does not speak in terms of identity of issues. Identity of issues is only important because it bears on motive. Thus, the rule deletes the law common phrase "identity of issues" and substitutes "motive" and "opportunity."

(b)(2) *Statement Under Belief of Impending Death***.** ~~This rule is broader than the common law dying declaration exception formerly observed in Mississippi practice.~~ The rule allows for the dying declaration to be used in homicide cases and in civil actions, but it is not available in non-homicide criminal actions. ~~Mississippi practice has permitted dying declarations only in cases of homicide.~~

(b)(3) *Statement Against Interest***.** Rule 804(b)(3) expands the common law exception of declaration against interest. Traditionally, courts have recognized two declarations against interest, pecuniary and proprietary. The rule extends the exception to declarations against penal interest on the theory that such declarations are reliable. No reasonable person would make such a statement and invite ~~subject himself to~~ possible criminal prosecution ~~liability~~ if the statement were not true.

The second sentence of the rule is concerned with hearsay which inculpates the declarant but exculpates the criminal defendant. Unless such a statement can be corroborated as reliable, it will be excluded.

(b)(4) *Statement of Personal or Family History***.** This rule is similar to Rule 803(19). The distinguishing feature is that the statements under Rule 804(b)(4) are statements made by unavailable declarants concerning their own personal and family history or that of a family member or intimate associate. Rule 803(19) focuses more on reputation.

(b) (5) This rule is identical to Rule 803(24) in both language and

intent.

(b)(6) *Forfeiture by Wrongdoing.* Rule 804(b)(6) provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir.1982), *cert. denied*, 104 S.Ct. 2385 (1984). *Davis v. Washington,* 126 S. Ct. 2266, 2280 (2006) ("While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."). Likewise, a party forfeits rights under the Confrontation Clause when misconduct attributable to a party causes a witness's absence. *U.S. v. Carson,* 455 F.3d 336 (C.A.D.C. 2006) (wrongdoing by co-conspirators). The wrongdoing need not consist of a criminal act and the rule applies to all parties, including the government.

When any of the hearsay exceptions in Rule 804 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington* 124 S.Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington,* 126 S.Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Rubenstein v. State* 941 So.2d 735 (Miss. Ct. App. 2006) (applying Rule 804(b)(5) in light of *Crawford* and finding statements nontestimonial); *Bell v. State,* 928 So.2d 951 (Miss. Ct. App. 2006) (applying Rules 804(a)(6) and 803(2) in light of *Crawford* and finding statements testimonial).

Mississippi Rule of Evidence 801. Definitions

Reporter's Note: The proposed amendments to the Rule and Comment track corresponding federal changes. Specifically, the amendments provide that statements offered under 801(d)(2)(C)-(E) shall be considered, but are not alone sufficient, to determine preliminary questions governing the admissibility of the statements. Essentially, this confirms that foundational facts are governed by Rule 104, not the law of agency. This appears to be largely consistent with current Mississippi law, though significant ambiguity exists.

Other changes render the rule gender neutral.

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person ~~him~~ as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's ~~his~~ testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with the declarant's ~~his~~ testimony and is offered to rebut an express or implied charge against the declarant ~~him~~ of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person ~~him~~; or

(2) *Admission by Party-Opponent*. The statement is offered against a

party and is (A) the party's ~~his~~ own statement, in either an ~~his~~ individual or a representative capacity or (B) a statement of which the party ~~he~~ has manifested an ~~his~~ adoption or belief in its truth, or (C) a statement by a person authorized by the party ~~him~~ to make a statement concerning the subject, or (D) a statement by the party's ~~his~~ agent or servant concerning a matter within the scope of the ~~his~~ agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Comment

Subsection (a) defines with clarity the concept of a statement. The significant point is that nothing is an assertion unless intended to be one. This becomes particularly important in situations which deal with nonverbal conduct. Some nonverbal conduct is clearly tantamount to a verbal assertion, e.g., pointing to someone to identify that person. The definition of statement excludes nonverbal conduct which is not assertive. Thus, the definition of hearsay in Rule 801(c) concerns itself with conduct that is assertive.

When evidence of conduct is offered on the basis that the conduct was not a statement and, therefore, not hearsay, the trial judge must make a preliminary determination to ascertain whether an assertion was intended by the conduct. The burden is upon the party claiming that the intention existed.

Subsection (c) codifies and simultaneously clarifies the common law definition of hearsay. If the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay.

Under this definition of hearsay an out-of-court statement made and repeated by a witness testifying at trial is hearsay. The key is whether the statement is made while testifying or whether it is out-of-court. An out-of court statement otherwise hearsay is technically no less hearsay because it

was made in the presence of a party.

Subsection 801(d) has two major parts and both are departures from past Mississippi practice. The purpose of subsection (d) is to exclude statements which literally fall within the definition of hearsay from the hearsay rule.

Subsection 801(d)(1) is concerned with prior statements of the witness. In three specific instances, a witness's prior statement is not hearsay.

Prior inconsistent statements have generally been admissible for impeachment purposes but not admissible as substantive evidence. *Moffett v. State*, 456 So.2d 714, 719 (Miss. 1984). This has been the traditional practice in Mississippi. Under Rule 801(d)(1)(A) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, e.g., at a deposition or at a judicial proceeding. This covers statements made before a grand jury. There is no requirement that the prior statement be written. If the defendant in a criminal trial has made a prior inconsistent statement, the situation is governed by Rule 801(d)(2).

Rule 801(d)(1)(B) provides that prior consistent statements may be introduced for substantive evidence when offered to rebut a charge against the witness of recent fabrication.

Rule 801(d)(1)(C), which declares that prior statements of identification made by a witness are not hearsay, is not a departure from pre-rule practice. The Court in *Fells v. State*, 345 So.2d 618 (Miss. 1977), departed from the traditional view that such statements were hearsay by adopting what was then the minority view that statements of identification could be admitted as substantive evidence of that identification. The scope of the rule is broader than the *Fells* holding in that: (1) there is no need for a prior attempt to impeach the witness for the identifying statement to be admissible; (2) the testimony about the prior statement may be from the witness who made it or another person who heard it; (3) the witness who made the statement need not make an in-court identification; and (4) the statement may have been made either in or apart from an investigative procedure. Statements physically describing a person are not statements of identification under this rule. The Confrontation Clause is not violated when a third party testifies about an out-of-court identification made by a witness

who is unable to recall or unwilling to testify about that identification, provided the identifying witness testifies at the trial or hearing and is subject to cross-examination. *U.S. v. Owens,* 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed. 2d 951 (1988).

Rule 801(d)(2) deals with admissions made by a party-opponent other than admissions made pursuant to M.R.C.P. 36(b). Admissibility of admissions made pursuant to M.R.C.P. 36(b) is controlled by that rule and is not affected by Rule 801(d)(2). The practice has been in Mississippi to treat an admission as an exception to the hearsay rule. Rule 801(d)(2) achieves the same result of admissibility although it classifies admissions as non-hearsay. There are five classes of statements which fall under the rule:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required. It is only necessary that the statement be relevant to representative affairs.

(B) If a party adopts or acquiesces in another person's statement, it will be deemed that the statement is indeed his admission. Knowledge is not a necessary ingredient. *Matthews v. Carpenter*, 231 Miss. 677, 97 So.2d 522 (1957); *Haver v. Hinson*, 385 So.2d 606 (Miss. 1980). This raises the question of when silence is a form of admission. Silence may constitute a tacit admission if a person would have, under the circumstances, protested the statement made in his presence if the statement were untrue. In civil cases, this does not pose a significant problem. In criminal cases, much may depend on the person's constitutional right not to incriminate himself.

(C) The general principle survives that a statement by an agent authorized to speak by a party is tantamount to an admission by a party. The rule covers statements made by the agent to third persons as well as statements made by the agent to the principal. The essence of this is that a party's own records are admissible against him, even where there has been no intent to disclose the information therein to third persons.

(D) The common law required that the agent's statement be uttered as part of his duties, i.e., within the scope of his agency. 801(d)(2)(D) regards this rigid requirement and admits a statement "concerning a matter within the scope of his agency" provided it was uttered during the existence of the

employment relationship.

(E) This section codifies the principle that only those statements of co-conspirators will be admissible which were made (1) during the course of the conspiracy and (2) in furtherance of it. This is consistent with the United States Supreme Court's ruling in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 709 (1949), which deemed inadmissible statements made after the conspiracy's objectives had either succeeded or failed.

Rule 801(d)(2) provides that the court shall consider the contents of the declarant's statement in resolving preliminary questions relating to a declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), and the existence of a conspiracy and the identity of the participants therein under subdivision (E). Generally, foundational facts are governed by Rule 104, not the law of agency. *See Bourjaily v. United States*, 107 S.Ct. 2775 (1987). Under Rule 104(a), these preliminary questions are to be established by a preponderance of the evidence. Of course, in determining preliminary questions, the court may give the contents of the statement as much (or as little) weight as the court in its discretion deems appropriate. Moreover, Rule 801(d)(2) provides that the contents of the statement do not alone suffice to establish the preliminary questions. Rather, the court must in addition consider the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, and evidence corroborating the contents of the statement. *See Ponthieux v. State,* 532 So.2d 1239, 1244 (Miss. 1988) ("on appeal … [w]e search the entire record to determine whether the preliminary fact has been established);
Martin v. State, 609 So.2d 435 (Miss. 1992).

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

Reporter's Note: Two changes to the Comment address the fact that *Idaho v. Wright* has been supplanted by the landmark confrontation clause decisions in *Crawford v. Washington* and *Davis v. Washington*. There are no corresponding federal changes.

First, a citation to *Idaho v. Wright* in that portion of the Comment which concerns 803(25), the "Tender Years Exception," has been replaced with citations to two Mississippi cases. This reflects the fact that interpretation of 802(25) is now a matter of

state evidence policy, not federal confrontation clause concerns.

Second, that portion of the Comment which speaks to the confrontation clause generally has been substantially revised and expanded to address the implications of *Crawford v. Washington* and *Davis v. Washington* as they relate to all hearsay exceptions under Rule 803.

* * * * * * * * * * *

(25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Comment

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(25) Tender Years Exception. Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. ~~*Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)~~. *Smith v. State,* 925 So.2d 825, 837 (Miss. 2006); *Hennington v. State,* 702 So.2d 403, 415 (Miss. 1997). A finding that there is a substantial indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years." *See Williams v. State,* 427 So.2d 100 (Miss. 1983). Many jurisdictions limit

their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration required for admissibility under M.R.E. 803(25)(b)(2) need not be eyewitness testimony or physical evidence, but may include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

~~If this exception is applied in a criminal case,~~ When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. ~~*See Idaho v. Wright*, 497 U.S. 804, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).~~ *Crawford v. Washington* 124 S.Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington,* 126 S.Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Osborne v. State*, 942 So.2d 193 (Miss. Ct. App. 2006) (applying Rule 803(25) in light of *Crawford* and finding video of child's statements produced at the direction of the district attorney testimonial but no confrontation clause violation because child testified and was subject to cross-examination); *Bell v. State* 928 So.2d 951 (Miss. 2006) (child's statements to police testimonial and therefore improperly admitted under 803(2)); *Hobgood v. State,* 926 So.2d 847 (Miss. 2006) (applying Rule 803(25) in light of *Crawford* and finding statements by children to family members and health care providers not testimonial but similar statements to police testimonial); *Foley v. State,* 914 So.2d 677 (Miss. 2005) (statements made as part of "neutral medical evaluations" not testimonial and properly admitted under 803(4) and 803(25)).